

PROBLEMS OF THE FIFTH AMENDMENT IN MODERN TIMES

Throughout the academic year 1955-56 Marquette University has been celebrating its 75th Anniversary. A number of scholarly discussions have been presented by the University to carry out the theme of the celebration—"The Pursuit of Truth to Make Men Free."

A program of this sort was sponsored on November 14, 1955 by the Marquette University Law School. In an effort to dispel some of the confusion and misunderstanding surrounding the use of the Fifth Amendment self-incrimination provision three scholars were invited to give addresses on the topic "The Problem of the Fifth Amendment in Modern Times." Reverend John R. Connery, S.J. was requested to clarify the moral aspects of the problem. Dean Erwin N. Griswold and C. Dickerman Williams were asked to present somewhat contrasting legal viewpoints.

The lectures are reproduced just as they were given in the three articles which follow this introduction.

THE RIGHT TO SILENCE

REVEREND JOHN R. CONNERY*

A few years back the press carried the story of an Italian missionary priest in China who mutilated his tongue to avoid betraying his Christian flock into the hands of his Communist accusers. Whatever value judgment one may pass on this act of heroic courage, it was obviously an attempt to protect a right to silence which the priest feared might otherwise be violated. The right to silence is the subject of vicious attack in the Communist world today. Communism recognizes no such right. No man's thoughts are his own, no man's secrets are inviolate in the world of Communism. Just as a man's material goods are common, so his thoughts, his innermost secrets, belong to the state. And any tactics required to get possession of them are justified.

The aid of science itself has been enlisted in this attack on the right to silence. Other ages saw confessions wrung from victims by means of rather crude methods of physical torture. It has been left to our age of progress to witness a scientific attack on the mind itself. Brain-washing techniques, truth-drugs (a misnomer if there ever was one), hypnotic and post-hypnotic suggestion, all have been used to draw from their victims contrite and abject confessions of purely fictitious crimes.

It should be obvious to everyone that man has a right not only to silence but to any other legitimate means of self-defense against any attempt to elicit a false confession. No one would ever question this right. In fact, moralists, far from questioning the right to silence, have actually questioned the liceity of a false confession in such circumstances. It will perhaps soften our judgment toward those who in recent times have made false confessions to escape torture to mention that many moralists did not consider this seriously wrong even though it might lead to a death sentence.¹ Undergoing extreme torture was considered by them an extraordinary, and therefore non-obligatory, means of preserving life.

But we are more concerned here tonight with the right to silence in a situation of actual crime. May a crime be legitimately concealed from the public authorities? Before any attempt can be made to handle this question, it must be broken down into more specific issues. A distinction must be made between the actual criminal and others who

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¹ LEONARDUS LESSIUS, S.J., *DE IURE ET IUSTITIA*, Lib. 2, Cap. 11, Dub. 7, n. 41.

have knowledge of the crime. And in connection with those who have knowledge of the crime two distinct obligations must be considered, the obligation to report a crime or denounce a criminal and the obligation to serve as a witness in a criminal case. We will deal first with the obligation of the criminal himself.

All moralists admit that no criminal has an obligation to make a spontaneous revelation of his crime to the public authorities. This would be expecting too much of human nature. But the problem goes deeper. It concerns not so much a spontaneous revelation as the obligation to admit a crime when questioned by public authority. Is the defendant in a criminal case obliged to answer truthfully when questioned directly by public authorities concerning his guilt? Moral theologians have always held that a subject is bound to answer truthfully a legitimate question put to him by a superior. But the concept of the legitimate question in connection with a defendant in a criminal case has undergone a very interesting evolution during the past several centuries.

It was always held by moralists that no one was bound to confess a completely hidden or occult crime. The maxim *Nemo tenetur prodere seipsum*, that is, no one is obliged to betray himself, was always considered to cover at least this one case. For the rest, St. Thomas Aquinas tells us that the law will determine when a judge may legitimately question a defendant in a criminal case. In his day and for several centuries afterward it was the Roman Law that determined judicial procedure. According to Roman Law a judge was allowed to put a direct question to a defendant regarding his guilt whenever (1) he was under infamy for the crime, that is, when he was publicly known to have committed the crime, or (2) when there was clear evidence, or (3) when a semi-complete proof could be brought forth against the defendant.² The semi-complete proof could be provided by the testimony of one immediate witness who was well above all suspicion (*omni exceptione maior*). If any of these three conditions were fulfilled, the judge could question the defendant concerning his crime and according to St. Thomas Aquinas he was bound to answer truthfully.³

It is interesting and pertinent to our discussion tonight to note that exception was always made for cases in which the defendant was not guilty of a crime.⁴ For instance, if a person were accused of homicide in a case where actually the death resulted from legitimate self-defense, moralists held that the defendant would not be obliged to

² SUMMA THEOLOGICA, II-II, q. 69, a. 2.

³ *loc. cit.*, a. 1.

⁴ CURSUS THEOLOGIAE MORALIS, COLLEGII SALMANTICENSIS, Tom. VI, Tr. 29, Cap. 7, Punct. 1, n. 19.

answer a judge questioning him whether he killed the man. Also, in circumstances where the defendant had committed no crime but would become suspect if he gave a direct answer to a question, moralists held that he could maintain silence or give an evasive answer. Thus, if the gun with which the crime was committed belonged to him and he was questioned regarding its ownership, moralists would not oblige him to admit ownership. We are here in the area of evidence which would tend to incriminate even in a case where no crime had been committed by the defendant. Moralists have never obliged a defendant to admit such evidence.

Should one be tempted to pass a rather harsh judgment on the theologians and jurists of the scholastic age who imposed on a criminal the obligation to confess his crime when legitimately questioned, it might be well to mention a few mitigating circumstances. First of all, a confession was ordinarily necessary for conviction. Since normally the complete proof was difficult to obtain independently of a confession, and the exception rather than the rule, the confession was ordinarily necessary to complete the proof against the defendant. Moreover, if one feels that the defendant was at a disadvantage in comparison with the defendant in modern times, it might be well to remember that the position of the plaintiff in those days restored some of the balance. The plaintiff who could not prove his case was liable to a conviction for calumny and a subsequent application of the *lex talionis*, that is, the law of retaliation.⁵ One who realized that he would be liable to the very punishment which the defendant, if convicted, would have received would be careful not to introduce a case without adequate evidence.

This opinion of St. Thomas Aquinas prevailed for several centuries. But early in the fifteenth century another opinion took root which would eventually (in the late 18th century) make its way into modern legal codes and inspire our own Fifth Amendment. Nicholas Tudeschi, Archbishop of Palermo, known among theologians and jurists as Abbas Panormitanus, in his Commentary on the Decretals of Gregory IX stated that the opinion of St. Thomas and his followers was true in connection with spiritual penalties but not in relation to temporal penalties.⁶ This opinion was taken up by the so-called Summists of the late fifteenth and sixteenth centuries.⁷ These Summists, who wrote practical moral manuals for confessors, carried little authority but they were later supported by several of the more speculative moral

⁵ SUMMA THEOLOGICA, II-II, q. 68, a. 4.

⁶ COMMENTARIA IN 5 LIBROS DECRETALIU P. GREGORII IX, Cap. "Cum Super in De Confessis," Vol. 3, p. 348, nn. 18-20.

⁷ ANGELUS DE CLAVASIO, SUMMA ANGELICA; BARTHOLOMAEUS FUMUS, SUMMA AUREA ARMILLA; SYLVESTER PRIERIAS, SUMMA SYLVESTRINA: Under the word "Confessio Delicti."

theologians who adopted the opinion. By the end of the sixteenth century it was considered a solidly probable opinion that at least where the death sentence awaited the defendant he would not be obliged to give a direct answer to a judge who questioned him about his guilt.⁸ This opinion was later extended (by Lessius, it seems) to cases where other penalties of a very serious nature were involved, e.g., condemnation to the galleys, confiscation of property, complete loss of reputation, etc.⁹

Several arguments were used to support this opinion.¹⁰ The main argument used by these moralists seemed to be that a law should be humanly possible and accommodated to human weakness; otherwise, it is a useless law and serves only to burden consciences. These authors go on to say that it is impossible, humanly speaking, to expect a man who knows that he would not be condemned otherwise to provide the court with the testimony necessary for his conviction. One might as well expect him to provide his executioners with the necessary weapons. To add strength to this argument Cardinal De Lugo goes on to say that experience has shown that the only thing which brings out these confessions is the fear of torture.¹¹ Without torture the state would have little chance of eliciting such confessions. This experience clearly shows that confessions of guilt, at least where serious penalties are involved, go beyond the powers of weak human nature.

Moral theologians also argued that no one should be obliged to cooperate in his own punishment. Going back to St. Thomas, they found that working on this principle he allowed a criminal to evade a court summons. He also allowed a condemned criminal to escape from jail if he could do so without the use of violence. These theologians saw no reason why the same principle could not be applied to a direct question regarding guilt.

A third argument was drawn from an analogy with the obligations of a witness. The witness is ordinarily not obliged to testify against close relatives. How much less reason is there to oblige or expect one to testify against himself.

Fourthly, they argued that a human law can only in very rare circumstances impose an obligation on subjects which would involve an heroic act of self-sacrifice. Thus, for instance, in time of war, if there were question of preventing some serious harm to the community, the state might oblige one of its citizens to go on what would practically be a death mission. It is not clear, they argued, that this

⁸ IOANNES DE LUGO, *DE IURE ET IUSTITIA*, Disp. 40, Sect. 1, n. 14 (Vol. 7).

⁹ LEONARDUS LESSIUS, *DE IURE ET IUSTITIA*, Lib. 2, Cap. 31, Dub. 3, n. 17.

¹⁰ *loc. cit.*, n. 16.

¹¹ *DE IURE ET IUSTITIA*, Disp. 40, Sect. 1, n. 16.

situation of very serious harm to the community would be verified if a criminal were not to confess his crime. It is difficult to understand, then, how a human law can impose on a defendant an obligation which would involve the loss of his life.

Finally, they argued that no one is obliged to testify against another in a case where he would have reason to fear serious harm to himself. The same argument seems to carry weight in regard to self-incrimination. It would be somewhat incongruous if in a situation where only a defendant and a witness knew of a crime the witness would be excused from giving testimony because it would result in serious harm to himself whereas the defendant would not be allowed to use such an excuse.

With these arguments such moralists as Peter of Navarre, Emmanuel Sa, Lessius, Reginaldus, Filliucius, De Lago, and many other theologians of the late 16th and 17th centuries, including Suarez, allowed a defendant in a criminal case where there was liability to a very severe penalty to evade a direct question regarding guilt.¹² The opinion at that time did not completely overshadow the opinion of St. Thomas but it was accepted as a solidly probable opinion which could safely be reduced to practice.

With the advent of modern civil codes the right to silence of a defendant in a criminal case has been established in judicial procedure. This right is embodied in our own Fifth Amendment. It has been established by removing from the judge the right to demand a confession or incriminating evidence from the defendant. The defendant is no longer under oath, that is, unless he consents to take the witness stand, and it is up to his discretion to plead guilty or not guilty to a criminal charge. This is true even in Ecclesiastical law. Canon 1743 of the Code of Canon Law reads as follows:

The parties are bound to respond and answer truthfully when the judge legitimately questions them, unless the question concerns some crime committed by themselves.

Thus, while the general principle that one is bound to answer truthfully when legitimately questioned by a superior is still valid, the trend of modern legislation has been to remove personal guilt from the legitimate area of judicial questioning.

The purpose of this legislation is not to protect or give immunity to the criminal. It is rather to adjust the demands of the law to the capacity of human nature and eliminate the need of the torture system as a necessary reinforcement of the human will. As De Lago said, it was not the demands of the law but the fear of torture that brought out confessions of guilt. It seems clear then that there is a very inti-

¹² Cf. DE LUGO, *op. cit.*, n. 14.

mate connection between obligatory confession and the torture system. Besides involving a violation of the human person before he was found guilty of any crime, this system had one serious defect; it was equally effective in eliciting false as well as true confessions. Since the confession was more an indication of the severity of the torture than of actual guilt, there was no guarantee against condemnation of an innocent person. Our own legislation, in refusing to allow the violation of the human person before guilt has been established, shows a much greater respect for the dignity of the human person. It may be true that it gives protection to those who in no way deserve it. But it prefers to allow a criminal to go unpunished rather than run the risk of submitting an innocent person to unjust punishment.

But the problem being discussed here tonight concerns not only those who have committed crimes but also those who have knowledge of criminal conduct on the part of others.¹³ Obviously, these latter cannot have the right to silence which the defendant enjoys. If they did, the whole function of judicial prosecution would be impossible. As already mentioned, two distinct obligations can be considered relating to persons having knowledge of crime, the obligation to report the crime and the obligation to serve as witness in a criminal procedure. Let us first consider the obligation to report crime.

Prescinding from those who are obliged by reason of their office to report crime, e.g., local and state police, agents of the Federal Bureau of Investigation, etc., one can make the general statement that the obligation to report a crime is somewhat limited. There are many instances in which an ordinary citizen may laudably report a crime but in which no obligation can be imposed. We are not dealing with such cases but only with those cases in which an obligation to report crime exists.

All moral theologians admit that no one has an obligation to report a crime committed against his own person which in no way affects others. The evangelical counsel to forgive trespasses committed against us precludes the possibility of such an obligation. It does not, of course, prevent one from making a denunciation of a criminal to the public authorities. Moral theologians agree further that there is no obligation, at least from a juridical standpoint, to report a crime which affects only the delinquent and in no way harms others.

This leaves only two cases to be considered. The first concerns a crime which is a cause of unjust damage to an innocent third party; the second, one which does damage to the community. Charity would

¹³ This material on the obligation to report crime and serve as a witness may be found in any treatise on moral theology. The material presented here is taken chiefly from DE LUGO, *DE IURE ET IUSTITIA*, Disp. 38, Sect. 2 and Disp. 39 (Vol. 7).

oblige one to protect the innocent third party unless doing so would involve serious difficulty. In crime involving damage to the community the obligation to make a denunciation binds even at the cost of serious personal inconvenience. The common good is to be preferred to the good of the individual. Since this paper is concerned predominantly with damage to the community, we will not consider the case of damage to an innocent third party.

But the obligation to report crime, even where it prevails, does not fall equally on the shoulders of all. In determining it, the first factor to be considered is the origin of the knowledge. Those who are in possession of knowledge of crime by reason of professional work of a fiduciary nature have either no obligation to report a crime or a very limited one.

One who has received information regarding a crime through the medium of sacramental confession, far from having any obligation to report it, would incur the most serious ecclesiastical penalties for revealing it to anyone and would be guilty of a serious wrongdoing if he used it in any way which would be embarrassing to the penitent. There is no common good which would compensate for the damage that would be done if the relationship between confessor and penitent were undermined.

The professional secret, though sacred, is not as absolute as the sacramental secret. The doctor, the lawyer, the counselor must respect the confidence of his patient or client, but where there is question of serious harm to the community, he not only may but actually must report a crime. For instance, if a doctor discovered that a patient employed as a pilot in air transport or an engineer on the train were subject to epileptic fits or the victim of a serious heart condition, he would be obliged to report this fact to the patient's employer if he refused to change employment. In some states, also, a doctor is obliged to report to the police any patient treated for a bullet wound. But those engaged in professional work of a fiduciary nature must also consider the dangers that would result from loss of confidence in the profession and balance these against the harm that would be done by failing to report a case. If people were to be alienated from the profession by a fear that their confidence would not be respected, the common good might suffer greater damage than it would if a particular criminal were not apprehended.

Close relationship will also excuse one from the obligation of reporting a crime unless there is question of very serious harm to the community which would not otherwise be averted. Thus, a son would not be obliged to report a father for some crime committed. Besides being too much to expect of a son, reporting a father would seem to go contrary to filial piety.

No private citizen has an obligation to report a crime merely to see a criminal punished. The function of punishment is the duty of the state; it does not pertain to any private citizen. Neither does a private citizen have any obligation to report a delinquent if the fault has already been corrected and there is no danger of a relapse. Moreover, since no criminal is bound to manifest himself, neither would he be bound to manifest his accomplices if he could not do so without revealing his own crime, unless perhaps there were question of very serious damage to the common good.

What if one knows that even if he reports a crime, it cannot be proved juridically? Would he still be bound to make the report? An obligation might well exist even in this case. Reporting the crime would at least serve the purpose of alerting the public officials to the danger. It might well be that the danger to the community would be averted even though the delinquent might not be brought to justice.

One may wonder why moral theologians are so reluctant to impose obligations in regard to reporting crime. The reason is, I believe, that the right to a reputation is involved. Every man has a right to a reputation among his fellowmen. Such a reputation is necessary for survival within a community. This right extends even to a false reputation, so that ordinarily even a true crime, if it is occult, may not be revealed. The common good would also seem to demand this regard for the reputation of others. An atmosphere of informing does not make for peace and harmony in the community. It rather engenders suspicion and distrust, and inhibits the spirit of charity necessary to unite the members of the community into one organic social body. The right to a false reputation, of course, is not absolute, but it will prevail until one is guilty of some public crime or until some other right clearly supercedes it. This will obviously be the case when reporting a crime will be the only way of adverting serious harm to the community.

The final function which is pertinent to our discussion is that of witness. The distinction between one who denounces a crime and one who testifies is simply this; the witness is part of the judicial process itself. The witness does not function until formal accusation or denunciation has been made, or at least until the crime has been brought somehow to the attention of public officials.

The older moralists used to distinguish two types of criminal procedure, the inquiry and the procedure more familiar to us which followed upon formal accusation of the suspected criminal. In the former procedure the judge and his court of inquiry would visit the community where the crime occurred or at least where crime was suspected to exist and question the members of the community to uncover it. In such an inquiry moralists held that no member of the community would be obliged to testify unless the identity of the criminal were a

public fact. Again, the reputation of the culprit was at stake. If the crime were occult or at least his identity unknown, no one would be obliged to reveal the culprit in the inquiry.

But in the ordinary judicial procedure where formal accusation had already been made, the witness was bound under oath to testify truthfully to the knowledge he had of the crime. If he failed to do so, he would be guilty of serious wrongdoing. Although excusing causes were, and still are, admitted, the obligation to testify is much more absolute than the obligation to denounce. In general the good of the defendant gives way to the right of the state to proof. For instance, the obligation to testify truthfully would prevail even in a case where the crime was clearly a thing of the past and there was no danger of recurrence.

Moralists have, however, allowed some excusing causes even in regard to the function of witness. Secret knowledge, for instance, is considered for the most part privileged, just as it is in estimating the obligation to report a crime. Near relatives are also excused from testifying. Finally, if the witness has reason to fear that serious harm will come to himself from testifying he will be excused except in a case where his own good would have to be sacrificed to the good of the community.

There remains the task of applying these principles to the problem at hand, namely, the obligation to testify before a congressional committee. And the application is not easy to make. The reason for the difficulty is that the role of the witness before the committee with his rights and obligations has never been clearly defined. At one time he may find himself in the role of a defendant, at another in the role of one reporting crime, at still another in the role of witness. In a sense, also, he is not, strictly speaking, any one of these. Since congressional investigations are functions of the legislative rather than the judicial branch of our government and aimed at legislation rather than prosecution, those called to testify should not, at least in theory, be identified with functionaries in a judicial process. But in practice congressional investigations have taken on at least the superficial form of a judicial inquiry. It is also true that testimony presented to the committees is ordinarily available to the justice department for prosecution. Moreover, since such investigations are frequently public, even broadcast and telecast, the reputations of those called to testify, as well as any against whom they might testify, are at stake. Some legal clarification of the rights and duties of the witness before a congressional committee is certainly to be desired. But for the present the principles that apply to judicial procedure apply also to congressional investigations. Working on this assumption, I would arrive at the following conclusions:

1. It is not clear that one would have a moral obligation to testify to any personal crime or give answers which would tend to incriminate him in a congressional investigation. Though it is true that such investigations are not aimed at prosecution, as long as the witness is not made immune to such prosecution, his testimony can be used against him. It may be that the number of those who have been prosecuted in the past has been relatively small, but this is merely a *de facto* situation which hardly makes for security on the witness stand. Unless it is supported by juridical protection, it will be difficult to insure a witness that his testimony will not be used against him. Given this lack of legal security and the opportunity of appealing to the Fifth Amendment, it is difficult to see how an obligation can be imposed on a witness to give self-incriminating testimony.

2. One called before a congressional committee has a moral obligation to denounce a criminal when such testimony is necessary to avert serious harm to the community which could not otherwise be avoided. The obligation to make such a denunciation *to a congressional committee* will be clear when the harm can be averted only through legislation. If it can be averted through prosecution, a denunciation to the justice department would seem preferable.

3. There is no moral obligation to denounce one who has committed some crime in the past but who has mended his ways.

4. If the identity of the criminal is a public fact, *one serving as witness* would be morally obliged to answer truthfully any question put to him concerning the crime in a congressional inquiry. If the identity of the criminal is not a public fact but the committee can show that the equivalent of a formal accusation is in its possession, a witness would be obliged to testify concerning the crime unless he could claim some excusing cause.¹⁴

5. It is absolutely immoral to refuse to cooperate with a congressional committee *with the intention of* protecting evil or crime. While the moral law will allow the protection of those who are guilty of criminal acts, it can never sanction the protection of evil or crime itself. Any efforts, therefore, to block the rooting out of evil or the prevention of crime are clearly contrary to good morality.

In these conclusions it should be noted that we are speaking only of obligation. There is no attempt to determine what would be the better or the more patriotic course of action. Certainly, the desire of every citizen should be to cooperate as much as possible with those who are carrying on investigations for the welfare of our country. Actually,

¹⁴ It follows that if the identity of a criminal is not a public fact or if a congressional committee cannot provide the equivalent of a formal accusation, there is no obligation to testify. There might be an obligation to denounce the criminal if the conditions mentioned in n. 2 are fulfilled.

those who have been perfectly candid in dealing with such committees have fared better than those who have appealed to the Fifth Amendment. Such appeal, while it may give one a feeling of security against prosecution, rightly or wrongly, creates suspicion of guilt in the popular mind. The consequent impression is that the intent of those who appeal to this amendment is not so much to protect themselves as it is to protect evil and crime itself.

There has been no intention in this paper to discredit congressional committees in any way. It is certainly the function of congressmen to make whatever investigations may be necessary to the proper performance of their duty as legislators. They are entitled to question anyone from whom they have reason to expect helpful information. Our purpose has been merely to show that there are also other rights which may be legitimately pursued. The right to proof will at times yield to the right to silence. It may well be that the undeserving will hide behind this right of silence. It may even be that those who are invoking it today are doing so in behalf of a system which would destroy it. It would indeed be a catastrophe if such people should eventually succeed in destroying the right which is now protecting them. But it would be a greater catastrophe if we should destroy it ourselves.

THE FIFTH AMENDMENT TODAY

ERWIN N. GRISWOLD*

I am very glad to have the opportunity to participate in this discussion of one of the important questions of our time. There has been much public interest in problems of the Fifth Amendment over the past several years, and it seems to me highly desirable that the public should have as fine and complete understanding of the problems involved there as it can. It is therefore a fine thing, I think, that Dean Seitz and the Marquette Law School have planned a program of this sort. I am very happy indeed, and honored, to have the opportunity to appear with gentlemen of the caliber of Father Connery and Mr. Williams in discussing these questions.

My own feeling is that the greatest harm that has been done in this whole area over the past few years is that of setting man against man and ingendering suspicions among good honest, conscientious Americans. I'll let you into a secret. I regard myself as a good American. I am deeply attached to this country, my own, my native land. Indeed, I am especially pleased to come to Milwaukee and to this University named after that great pioneer, Father Marquette, in part because I too was born on the shores of one of the Great Lakes, Lake Erie. I grew up in Cleveland, and I think of myself as a middle-westerner now somewhat miscast in the East, and I rather feel at home when I come out to these middle western states.

Now I would like to say one more thing which probably is quite unnecessary and unwarranted, but I think it is worth stating—I don't like Communists—I don't like Communism. I think that Communism is the greatest single threat to America and to American civil liberties. I know full well that civil liberties would be more completely done away with than any other way if the Communists, internal or external, took over control of this country. I will go even further. I don't like people who ever have been Communists. I don't say that I wouldn't walk out of the same room with them or that I wouldn't listen to them discuss a problem. I am happier about people who were Communists and aren't now, very much happier than I am about people who are Communists now. But frankly, just between you and me, I have personally a serious reservation about the judgment of anyone who at any time has ever been a Communist.

At the present time we are inclined to think of Communism as our implacable and endless enemy. We are inclined to think that this struggle will go on for all time until one or the other prevails. But I

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don't take quite such a dim view. I think that it could go on for a long time, and in the process I think that the Russians in one way are our best friends, because if they really were skillful in this area they would have played good and would have done nothing to upset us over the past ten years, and then I think that it is very likely that they could, without very serious difficulty, have walked in and taken us over. But as a matter of fact, they have rattled the saber very vigorously outside and they have carried on rather obvious and not very skillful activities within the country so that we have been rather constantly alerted, and it seems to me that we are in good shape to take care of ourselves. We have excellent agencies designed for that end, and I have great confidence in them. Some people talk about the eternal struggle between our system and the Communists. I am inclined to recall the fact that some centuries ago people felt the same way as to the relations between the Christian world and the Mohammedan world, and that that struggle would never end until one or the other triumphed. Yet it did end, somehow or other; and in many ways, the Christian world now gets along very satisfactorily with the Moslem world. We have a considerable number of Arab students from one country or another at the Harvard Law School, mostly as graduate students, and I find them very intelligent, reasonable and interesting persons who do not seem, in any way, intent upon destroying us. And the time may well come when we may work out some sort of relationship with the Communist world. But clearly that is not the situation now.

Now turning more specifically to the Fifth Amendment, I am very happy, indeed, to have had this very enlightening discussion by Father Connery in terms of morals. I cannot attempt, of course, to speak as any moral authority, but as I followed his discussion it seemed to me that in most respects the law, as I understand it, was closely in accord with the morals as he outlined them. In the first place we are often told that a claim of the privilege under the Fifth Amendment is wrong, unjustifiable, illegal because there is a right in the public to have every man's evidence. I myself think that that right so stated is over stated. It seems to me quite clear that it is our law and is our practice that there is no right on the part of the public to have every man's evidence. One of the clearest instances, suggested by Father Connery, is the fact that it is the law and always has been, and as far as I know, no one questions it, that a wife is not required to testify against her husband or a husband is not required to testify against his wife. And similarly, the privilege between the attorney and client is well established and would, I am sure, be honored by virtually every lawyer even against an order of the court where the lawyer felt that that order was clearly unjustified. And similarly in legal terms the

privilege between priest and penitent is not merely well established, but is unquestioned in any court. So that it is not true that the public has the right to every man's evidence. It is true that under many circumstances the public has the right to every man's evidence, but the question is to determine in the particular case whether this is one of the situations where the public does have that right.

There is a tendency of rights to make themselves absolute, tendency to which Justice Holmes has several times made allusion. But actually most of the problems of life, most of the problems of law, with respect to life, at least, consist in adjusting the competing claim of two or more objectives each one of which would make itself absolute if it could. But no one of these claims can be absolute, and we have to adjust them and find out what is the proper balance. Indeed one of the things that makes life and law interesting is these problems of working out the proper balance between competing claims.

So this problem of the Fifth Amendment, it seems to me, is a part of a much broader question in our country today—the whole problem of the relation between security on the one hand and civil liberties on the other. Now security and civil liberties are both highly desirable things. Each one standing by itself could readily become an absolute. If we sought no end in life except security, we could no doubt achieve security and what we had made secure would not be worth having. And on the other hand if we sought no other object in life except civil liberty, we might have very great civil liberties and we might end up also with having lost our civil liberties to having given up all vestige of security. And so our problem is to work out that adjustment, and that, it seems to me, is the essential question in the Fifth Amendment and in the whole area of Congressional investigation of the present time.

My feeling is that in some quarters in some way we have lost some of that balance and that the Fifth Amendment has, in fact, proved to be a very valuable and a very sound weapon in maintaining some of the balance in favor of civil liberty on the one hand in the problem of adjusting security and civil liberties. I want to read now a passage from a Congressional investigation that was held in another state, and the senator involved comes from another state. I am not going to mention his name because I do not desire to make any attack of any sort on any individual. I am trying to discuss problems which are of great concern to you and to all of us. The individual involved here fortunately had a good anonymous name. He is Mr. Smith. So I am going to read his name, Mr. Smith, who was an attorney.

"I think it would be proper at this time if I could be informed by you, Sir, if there are to be any opportunities afforded me to question this witness concerning this."

Senator X:

"I judge you are a very reputable and a very fine lawyer, and if you are, you certainly know that in Congressional committee hearings there is no such thing as cross-examination by an attorney for a party. This is in the nature of a grand jury proceeding. You do not have that right, and I judge you know that never in the history of this country has such a thing been permitted and it will not be permitted here."

Mr. Smith: "The reason I ask . . ." Senator X: "I am not interested in the reason. There will be no right in cross-examination." Mr. Smith: "Are there any other rules of procedure that this committee is prepared to tell us?" Senator X: "I will announce them when I desire. Proceed." Now that is a quotation from the transcript of a Congressional hearing.

At approximately the same time there was being conducted in Australia, a very important investigation, into the Petrov Affair. The Petrov affair is highly illuminating to Americans, and I wish it were better known by more Americans, not merely the facts of the investigation but also the material disclosed by the report. It is very similar to the investigation of a Royal Commission in Canada in 1945, about which too little is known in this country. You may remember that Petrov was an employee of the Soviet Embassy in Australia, and that some year and a half ago he defected to the Australians; and some ten days later his wife, who was being taken out of the country by a Russian agent, also at the last moment chose to make her life in Australia. The Australian Government appointed a Royal Commission to investigate this affair. The Royal Commission consisted of three judges, one each from the Supreme Courts of three of the states in Australia. And those judges conducted a very painstaking and thorough investigation over a period of a year and about three months ago put out a very complete report. It happened that one of the judges is a friend of mine, and he caused to be sent to me by air mail the daily printed transcripts of these hearings, two copies—one of which, after looking at it, I put in the Harvard Law School Library, and the other of which I gave to the Russian Research Center at Harvard. When the report was finished, he sent me a copy of it, and he wrote me a letter in which this passage appeared:

"You will probably also be interested in our procedures in a Royal Commission, which I gather differ in some respects from those followed by a Congressional Committee. A person against whom anything was alleged was given notice of the allegation before his name was publicly mentioned. He was summoned to appear as a witness at crown expense. Evidence concerning him was given in his presence, and he was entitled to be represented by counsel, of course, at his own expense. Most witnesses were

represented by counsel. Counsel had full opportunity of cross-examining any witness giving evidence affecting his client and of examining his client when he was called to the witness stand. Counsel had no right as he has in a court trial, of calling such witnesses as he thought fit, but he could apply to the Commissioners to summon a witness. No such application was refused except where we thought the evidence proposed to be used would be irrelevant or unnecessary. I am afraid that many Americans would think our methods in such an inquiry involving Communists rather kid gloved but they are in accordance with our tradition which rightly or wrongly we feel to be sound."

I would like to say to you that I think that such procedures are, indeed, in accord with our tradition in this country, and it is most unfortunate that over the past few years some few people in public office have failed to comply with that very sound and very salutary tradition.

Now what has this to do with the Fifth Amendment. I think it has a great deal to do with the Fifth Amendment, because I think that the way which some Congressional investigations have been conducted has much to do with the explanation as to why people have claimed the privilege of the Fifth Amendment in Congressional investigations.

In the first place, let us put completely to one side the claim of privilege under the Fifth Amendment with respect to trials in court. As far as I know there is simply no controversy about that. The controversy arises with respect to the claim of privilege in connection with investigation conducted by legislative agencies. Now let me also say one thing more. I think that in many cases the privilege has been wrongly claimed by people who were not legally entitled to do so, and I also think that in many cases where the privilege was claimed by persons who were legally entitled to do so they were mistaken in claiming the privilege and they would have been better off and everyone else would have been better off and much less harm would have been done to the cause in which they were interested, if they had not claimed the privilege. Nevertheless, what we are dealing with in many of these cases is the fact that people do claim the privilege, rightly or wrongly; and it seems to me highly desirable that we should understand the reasons which lie behind the claim of privilege in many of these cases and should not jump to conclusions with respect to the proper inferences, the proper conclusions, to be drawn from that claim.

Now it is often said that a person who claims the privilege against self-incrimination is obviously either a criminal or a liar. Either he committed the crime, in which case if he claims the privilege, he is a criminal and he is simply avoiding having to confess it and out of the kindness of our heart we don't make him confess it; or else he

didn't commit the crime, and then when he claims the privilege and says that he will be incriminated if he answers, he is a liar; and therefore, it's obvious that he is either a criminal or a liar. Now Father Connery pointed out very plainly in his address that that is not the case. He referred to the man who was the owner of the gun with which the crime was committed but who did not himself commit the crime. Nevertheless, if he admits ownership of that weapon, he may be in a very difficult situation. There is a case where a person may legally, clearly, claim the privilege, rightly, although he did not commit the crime.

There are other types of situations with which lawyers, who practice in the criminal courts, are thoroughly aware. Just think for a moment of the plight of some poor devil who hasn't done very well in life but is trying now. He has twice before been convicted of crime, has served time in jail for each one of them, and is now out and trying very hard to lead an honest life and thinks that he is successful. But he is picked up by the police and charged with an offense, which he didn't commit, and which he knows he didn't commit. I don't want to blame the policemen much because the offense was committed and here is this fellow that everyone knows has a record and someone saw him hanging around the corner not long before the crime was committed, so the natural thing to do was for the police to bring him in and charge him. Well now he is tried, and you're his lawyer, and the obvious thing to do is to put him on the witness stand and let him deny that he committed the crime. And the moment you do that, he is subject to cross-examination and as soon as the cross-examination is started, out come these two prior convictions of other offenses. And then how long does the jury believe that he didn't commit this crime. Everyone knows that any criminal lawyer in that situation simply has to decide whether he likes it or not, and knowing full well that it probably will be fatal, he simply has to decide that his client cannot take the stand. And yet there is a case where the man did not commit the crime, where his failure to take the stand is not an admission of guilt. It is simply one where the circumstances are that if he is subjected to cross-examination he is surely sunk and he is just almost surely sunk if he doesn't take the stand; but being almost surely sunk is a little better than being surely sunk, so the lawyer tells him not to do it. Now that really is one of our tough situations. So is it not perfectly clear that a man may claim the privilege although he neither committed an offense nor is he lying when he says that he will be incriminated if he gives an answer?

Quite apart from that there are a good many other reasons, it seems to me, why people sometimes claim the privilege even though they would be better advised and would be making wiser decisions if

they did not claim the privilege. One of the reasons is that a good many people, particularly people who get involved in this area, are just plain stubborn. They are the kind of people that martyrs are made out of and sometimes they just go down the line and make themselves martyrs, and I am sorry when they do. I had a letter just this Fall from a man who asked me for some help which I was unable to give him and, of course, I won't mention his name, but this is one of the paragraphs in his letter.

"For your information, although I would never upon demand tell any man, I am not nor have I ever been a member of the Communist party or a member of any organization upon the so-called Attorney General's list. I am not a Marxist and, in fact, I disagree with most of what I know of it, and I think that my political philosophy closely parallels that of Thomas Jefferson."

But note that "although I would never upon demand tell to any man." Now there are a lot of people who act and think that way. They don't like to be pushed around. I don't like to be pushed around, but sometimes when I am being pushed around I may find it, on the whole, the part of wisdom, to play along, because maybe I can get through it without doing too great harm and it will be easier than just getting my back up. But there are some people who are made of sterner stuff and they just say, "Look, I am not going to tell you when it is demanded of me. I will stand on my record. You have no right to ask me some of these questions." Now as a matter of fact maybe the inquirer does have a right to ask him some questions. But in this particular case, the man who doesn't answer is not guilty of the crime of being a Communist, if that is a crime. Generally it isn't. He is not guilty of the crime of concealing vital information from the government. He is just guilty of the crime of being stubborn. And there are many circumstances in which stubbornness is a quality which is rather highly regarded in this country.

There is another explanation of the claim of privilege. In a good many cases, it is a mildly technical one, one which seems to me not inappropriate to mention at a meeting sponsored by a Law School. This is the matter of waiver of the privilege. It is, of course, clear that where in an ordinary court case, a witness goes in and testifies affirmatively, he then becomes subject to cross-examination. And he cannot on cross-examination claim the privilege against self-incrimination with respect to matters about which he testified in his beginning evidence, because if he is going to try to use his evidence against the other side, the other side has a right to explore that evidence, and see whether it is sound. Thus it is well established that a witness who participates in the testimony in chief waives the privilege against self-

incrimination with respect to appropriate cross-examination about his testimony. I think that that is a rule that is fine, sound and more or less inevitable.

It is my own view, for what it is worth, that the Supreme Court made a mistake some four or five years ago in a case called the *Rogers* case, when they extended that rule to witnesses who are appearing before a Congressional Committee and who are simply responding to questions and who are not seeking to prove anything affirmatively for themselves or for any person on whose behalf they are appearing. Now in the *Rogers* case, the witness was first asked by an inquirer, before an investigating committee, whether she was or had been a Communist, and she said, "yes". And she was asked whether she had been secretary of the Communist party in Denver and she said, "yes". And then she was asked, "What did you do with the records of the Communist party in Denver?" She said, "I refuse to answer on the grounds of self-incrimination." The Supreme Court later held by a sharply divided court that by having answered those first two questions she had waived the privilege with respect to the whole field, the whole area, of her being a Communist and being secretary of a Communist Party and that she could not properly claim the privilege after having entered into the field. It seems to me a little odd that a person should be worse off because he cooperates part way and then stops than he is when he refuses to answer any questions at all. And yet that is the effect of the *Rogers* case, and I suspect that in a good many instances where persons have refused to answer questions that sounded very damning, it was because their counsel had told them, "Look, you can't answer a single question. If you want to rely on the privilege at all, you must claim the privilege at the very beginning and not answer a single question."

Let me illustrate this by a case with which I had to deal myself as Dean of the Harvard Law School, a case which is a matter of public record so that I can properly talk about it. We had two students at Harvard Law School, twin brothers, who were brought before a subcommittee of the Senate Judiciary Committee presided over by Senator Jenner two years ago last March. These students had been undergraduates at Cornell University and I rather believe, although I do not know, that when they were 17 and 18 years old, or perhaps 18 and 19 years old, they were members of an organization which I wish they had not been members of, to put it mildly. Thereafter they came to the Harvard Law School. They were asked by Senator Jenner, "Did you hold Communist meetings in your rooms at the Harvard Law School?" "I refuse to answer on the grounds of the Fifth Amendment." "Did you collect Communist party dues from other students at the Harvard Law School?" "I refuse to answer on the grounds of

the Fifth Amendment." From which, of course, a large body of opinion jumped to the conclusion, or perhaps I shouldn't say jumped, I don't want to overload it, came to the conclusion that they had held Communist meetings in Harvard Law School, and that they had collected Communist party dues from students in the Harvard Law School.

It isn't given to man to know for certain what other people did at some time past, but it is given to the Dean and his associates at the Harvard Law School to know a good deal about what goes on at the school through inquires of one sort or another, and it is my honest, best judgment in which I have great confidence. I do not regard it as a 51-49 matter but regard it as a 95-5 matter, that these students never held Communist meetings in their rooms in the Harvard Law School and never collected any Communist party dues in the Harvard Law School. Their trouble was that they were second year students in the Harvard Law School, and they knew some law and a little law is a dangerous thing. They knew this rule about waiver, and they felt that if they answered these questions, they would get back to the questions of what they did when they were in Cornell, and then they would have been held to have waived the privilege with respect to those questions and could not rely upon the privilege. So they claimed the privilege at the first opportunity. This I think is simply a consequence of the unfortunate and to me the unwarranted rule announced by the Supreme Court some years ago with respect to waiver. It was not a sound basis for coming to the conclusion that they had held Communist meetings in the Harvard Law School and had collected dues from students in Harvard Law School. I can only say that I think, though this issue didn't arise, that if we had concluded that they were currently Communists or had held Communist meetings in their rooms or had collected dues from fellow students in the Harvard Law School that we would have terminated their connection with the school. We came, on investigation, to the conclusion that they had not done those things at the school. We came to the conclusion that whatever they had done at Cornell some years before when they were 18 or 19 years old was not a thing as to which we should take action and we retained them in the school and in due course they graduated magna cum laude.

The Supreme Court has said some other things about the Fifth Amendment, which seem to me to be pretty good, and I would like to read just a few passages from two decisions of the Supreme Court announced last May, *Quinn v. United States* and *Emsbak v. United States*, both written by a simple, unassuming, great man, in my opinion, Chief Justice Warren. Now these passages are disconnected and anyone who wants to say so can say that they are taken out of context,

in which case I will be glad to leave the the entire copies of the opinions here and you can read them in context.

"The privilege, this Court has stated, was generally regarded then as now as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecution. To apply the privilege narrowly or begrudgingly, to treat it as a historical relic, at most merely to be tolerated, is to ignore its development and its purpose. It is precisely at such time when the privilege is under attack by those who wrongly conceive of it as merely a shield to the guilty that governmental bodies must be most scrupulous in protecting its exercise. If it is true that in these times a stigma may somehow result from a witness's reliance on a self-incrimination clause, a Committee should be all the more ready to recognize as valid claims of privilege. If an answer to a question may tend to be incriminatory, a witness is not deprived of the protection of the privilege merely because the witness if subsequently prosecuted could perhaps refute any reference of guilt arising from the answer."

There is one last thing. I have referred to stubbornness and waiver. There is one last thing that I think should be taken into account with respect to the claim of the privilege. Do not misunderstand me, I am not saying by any means that everyone that has claimed the privilege is an angel or innocent or anybody I would like to spend the week end with or anything else. I think a lot of them are very bad people, but I also think that a lot of people have claimed the privilege under circumstances which require our understanding and not our immediate condemnation. Another one of the factors, which seem to me to be highly relevant in this area, is a case of a witness being just plain frightened. Put yourself in a position of a witness who is summoned to one of these hearings. You probably have been a "liberal." That is now a word of disappropriation which seems to me to be a rather shocking commentary on our time. You probably have known people in the past which you are now pretty doubtful about. You are hailed down to Washington; you don't know what is up; you don't know what they may have in their files; they don't tell you whether there is any charge against you or whether you were simply thought of in respect to something else and then you go into the room and it is hot as blazes with Klieg lights, it has microphones all over the place, it has newsreel cameras, television cameras, it has dozens of reporters; and then, and perhaps most serious of all, it has some people presiding, who, in many instances, it seems to me, do not provide the basis for confidence that you are going to be subject to scrupulous fair play. There are people who have steel in their makeup. There are people who are born exhibitionists. There are people who could go down in that and keep their complete self control and dominate the

situation and carry away the day, but most people aren't that sort. Most people would be scared to death in that situation, and what do you do when you are scared to death? You clam up; and what is the easiest way to clam up in this area? Well, somehow or other, claiming the privilege against self-incrimination under the Fifth Amendment, rightly or wrongly, is one wall they haven't beaten down; and you simply know that, and if you're scared to death maybe you will retreat to any corner. But if you just say, "I won't answer on the ground of self-incrimination," there isn't anything they can do to you. I suspect that that has a good deal to do with the claim of privilege in some cases.

I have made some speeches before in this area which were printed in a little book called the *Fifth Amendment*. They are just speeches and they are just efforts to contribute to thought and discussion. Mr. Williams wrote a very thoughtful article in the *Fordham Law Review*, which came out last Spring, and I am very glad that he did. As a result Mr. Williams and I are not only appearing on the platform tonight but we appeared once before. We are always billed as being in violent opposition—it's going to be a great debate between Williams and Griswold. But the problem is to find any place where there is really any difference between us. And now I'm going to come to one of those places, I think, unless Mr. Williams has strengthened himself since the last attack. I can only say that the last time we appeared together he spoke first and I spoke after him, so that it is entirely appropriate that I should speak first and he speak after me tonight. And he may have something up his sleeve but if he does, I can only say that I shall listen to it with interest as I am seeking light in this area too.

One of the places where we differ, it seems to me, is with respect to the question of the inference to be drawn from a claim of privilege. Mr. Williams, in his article, says that an adverse inference is always drawn from silence. Well, I think that depends on what you mean by inference. I think it may well be that an adverse inference is always drawn from silence. But what is an inference? An inference isn't really very much. If you immediately transliterate that word inference into conclusion then I strongly disagree with Mr. Williams, and I think that there is some risk that maybe that has been what he has been doing in his thinking and that is what he will try to get you to think is sound in his talk, and more power to him if he can do so. But I still reserve my right to think it is wrong. I do not by any means take the position that a claim of privilege under the Fifth Amendment is an absolutely colorless act simply to be disregarded and nothing could happen when a person claims the privilege. By the same token and to the same extent, I do not take the view, for reasons which I have

tried to suggest, that the mere fact that a person claims the privilege justifies you or the public or anyone else, in coming to the conclusion that the person is a saboteur or a spy or a traitor or anything else except maybe stubborn or confused or overinformed with respect to the law as I think my two students were.

In a criminal case there is always evidence against the man, against the defendant. If there isn't any evidence against him, the judge directs a verdict of not guilty and the fact that he didn't take the stand or claim the privilege would not be evidence against him. In Congressional investigations, we ordinarily have no evidence against the man at all. Sometimes the Committee Chairman announces that "we have information in our files that so and so . . ." But frankly that doesn't appeal to me as evidence. And in the absence of evidence, I find it difficult to take the inference very hard.

There are cases where I would take the inference quite hard. One is the case of a bank teller. Ten thousand dollars is missing from his drawer. He is called to the bank president's office and he says, "I refuse to answer any questions on the ground of self-incrimination." I don't think that the bank will keep him in its employ very long, and I am quite sure I wouldn't if I were the bank president on those facts alone. I might want to make further inquiry, but in that case I wouldn't need much more inquiry. Another illustration, which seems to me a fairly clear one, is a young man teaching in a girl's school and some untoward event has happened and he is asked by the head of the school about it and he says, "I refuse to answer on the grounds of self-incrimination." I think he is out. Where there is evidence that something has been done, there is something closely connecting the person with it, and a person has to act with responsibility, I don't say that the claim of privilege should be completely ignored. In the same way, a question may arise before a grievance committee of a bar association. A lawyer is hailed before it on a complaint of a client that the lawyer has embezzled the poor widow's funds, and the lawyer says to the Grievance Committee, "I refuse to answer any questions on the ground of self-incrimination." My guess is that the Grievance Committee reports that he ought to be disbarred, and if I were on the Grievance Committee, I think I would, assuming that there is evidence as I have said connecting him with it, and he does not make any appropriate response.

Now let us apply this particular thing to the case of lawyers. There was a very interesting case down in Florida, just a few months ago—the *Scheiner* case. Scheiner was a lawyer and a member of the Bar in Florida. He was hailed before a Congressional Committee sitting in New Orleans. He refused to answer questions about Communist party membership on the ground of self-incrimination. No evidence was

produced at that hearing or elsewhere that he was a member of the Communist party. I don't say that there couldn't be such evidence. I don't say that he never was a member of the Communist party. I just say that there was no evidence of it. Thereupon the trial judge in his County in Florida issued a rule to him to show cause why he should not be disbarred on the sole evidence on his claim of privilege. The trial judge entered an order of disbarment. That was appealed in the Supreme Court of Florida where it was reversed last July by about a 6 to 2 or 5 to 2 decision, the Supreme Court of Florida saying that a man could not be disbarred without evidence and that his claim of privilege standing alone was not evidence of the facts involved. Now the committee that has that in charge is taking depositions in California and elsewhere getting evidence upon these facts and when that evidence is produced before the court it seems to me quite clearly that there may well be something for the court to act upon. But the mere claim of privilege alone, it seems to me, cannot properly be the basis for that sort of action.

There is another case to which I would like to refer decided by the Supreme Court of New Hampshire last March called the *Welanko* case. Welanko was a member of the Bar of the State of New Hampshire. The attorney general of New Hampshire filed a complaint against him seeking his disbarment on the ground that he was a member of the Community party. Welanko had moved from the state; he was given notice; he failed to appear or make any response whatever. And the court, I think, rightly held that he should be, not disbarred, but suspended; and they entered an order suspending him as a member of the Bar of the State of New Hampshire. He owed the obligation as a member of the Bar to respond to the hearing, and if evidence had been presented at the hearing to show he had done something which warranted disbarment that would be a ground for disbarment. When he failed to respond at all to the order of the court, it seems to me quite clearly, he was properly suspended.

I only have a few more things that I would like to say by way of conclusion. I referred to this little book of speeches of mine which is a very modest effort. There have been a number of reviews of it and the Stanford Law Review in one of its issues late last Spring had two reviews, both by graduates of the Harvard Law School, both men eminent and fine lawyers in California. One of the reviewers liked the book and the other one didn't like the book, and I thought having two reviews was a very fine way to deal with the problem. The man who didn't like the book, it seems to me, has fallen into—perhaps I shouldn't call it a trap—has fallen into the error of the “either he is guilty or he is a liar” proposition which is also the error into which it seems to me that a number of articles in the American Bar Journal

have fallen. I think it simply isn't true that a man is either guilty or he is a liar, and even if it was true perhaps being a liar in this case, though bad, would not be as bad as being guilty which is the inference which is often taken. One of these reviewers whose name I won't mention, sent on to me a letter which he received from a friend of his, also an eminent lawyer in California. In this review, the reviewer had referred to the fact that he, the reviewer, was a Republican and a conservative and he had said that he thought that was irrelevant. And the person who wrote to him said:

"While I share your own doubts as to the relevance of your being a Republican and a conservative, I am constantly surprised that so many members of our party seem to fail to understand that watering down the Fifth Amendment can well be the prelude to watering down the free enterprise system and the legal foundations for our way of life."

In 1780, John Adams was largely responsible for writing the Constitution of the Commonwealth of Massachusetts, a document, which though amended several times, is still in force. And there is one passage in that Constitution which is little known. It is fairly long, and I won't read it all, but it is the passage which it is said John Adams was most proud of. The passage is headed "The Encouragement of literature, etc., duties of legislates and magistrates in all future periods," and this passage in the Massachusetts Constitution concludes with these words,

"The authorities of the Commonwealth are urged to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealing, sincerity, good humor, and all social affections and generous sentiments among the people."

And I like to think that one of the things that we need in these United States in 1955 is a greater measure of good humor in public discussion and generous sentiments among all our people.

THE FIFTH AMENDMENT IN NON-CRIMINAL PROCEEDINGS

C. DICKERMAN WILLIAMS*

Our topic tonight is "The Fifth Amendment in Non-criminal Proceedings." It reflects the current interest in the privilege against self-incrimination that mention of the Fifth Amendment is assumed to refer to that clause of the Amendment which reads:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

There are of course numerous other provisions in the Fifth Amendment, several of them of great importance, but so great is the controversy over the privilege against self-incrimination that the existence of these other provisions is hardly realized by the general public.

In accordance with present popular practice I shall tonight use the expressions "Fifth Amendment" and "privilege against self-incrimination" or simply "privilege" interchangeably.

It is also curious that a privilege which developed as a feature of criminal prosecutions should be discussed today primarily in different connections, particularly in connection with congressional investigations and employment. Perhaps it is for this reason that we are having so much difficulty. We are trying to apply a privilege primarily intended for one context in other contexts.

Preliminarily it will be helpful to consider the historical rationale of the privilege. That rationale is most definitely *not* that ordinarily there is anything wrong in seeking information about a person from the man himself. As the Supreme Court pointed out in *Twining v. New Jersey*, no privilege comparable to the privilege against self-incrimination is "observed . . . in the search for truth outside the administration of the law."¹ In other words, when we want to find out something about a person we go to that person and ask him the questions we have on our minds. The propriety of that course is fully recognized by our legal codes of procedure in civil cases. At common law a party litigant was not competent to testify on his own behalf nor could he be called by his adversary. Beginning about 1840 the various states changed the rule and made parties to civil cases competent witnesses.² In recent years there has been greatly increased liberality about what is called "discovery." Under the Federal Rules

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¹ 211 U.S. 78, 113 (1908).

² 8 WIGMORE, EVIDENCE (3rd Ed. 1940) §§2217-2222.

of Civil Procedure, a party litigant can freely compel his adversary to produce documents and submit to oral questioning not only at the trial but also before trial.³ Pre-trial discovery is not quite so liberal in most states, but it exists in some form or other in practically all states, if not all of them.

If, then, the individual is recognized as the best source of information about himself, how do we happen to have the Fifth Amendment? The answer is clear, and I believe that Dean Griswold and I agree. The privilege originated in the revulsion of the English public against the use of torture in criminal investigation in the 17th century, particularly against torture by the Court of Star Chamber in its investigations of political agitators and religious heretics in the reign of Charles I, a revulsion brought to a head in the case of John Lilburne. The privilege became accepted in English law enforcements and jurisprudence about the year 1700. Until that time it was routine in criminal investigation that suspects were examined at length by a magistrate. Torture was applied if the magistrate thought the suspect was lying or otherwise recalcitrant.⁴

In the many debates that have occurred in the last century and a half over the value of the privilege, this matter of torture has remained a dominant theme. Beginning with Bentham, the English legal philosopher of the early 19th century, and continuing through the American trust-busting era of the late 19th and early 20th centuries and through the municipal reform period of the first part of the 20th century the privilege has been repeatedly attacked by legal scholars of the highest standing.⁵

The advocates of the privilege have continually defended it on the ground that police examination of suspects is bound to degenerate into torture or the equivalent of torture, such as the "third degree," unless the privilege exists. The police, we are told, and I believe correctly, should be made to build up their case from witnesses, not suspects. A remark by a British police official in India has caught the attention of students of this subject. The official said:

"It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."⁶

It has been suggested in the highest quarters that protection against torture could be combined with compulsory examination of suspects. Thus the Supreme Court of the United States said in 1937:

³ Rules 26-37.

⁴ 8 WIGMORE, *op. cit.* §2250, pp. 291-301.

⁵ A number of instances are given in the writer's article, *Problems of the Fifth Amendment*, 24 FORDHAM L. REV. 19, 22-24; *cf.* also 8 WIGMORE, *op. cit.* §2251.

⁶ Quoted in 8 WIGMORE, *op. cit.* §2251.

"This [privilege] might be lost and justice still be done . . . No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry."⁷

The language was that of Justice Cardozo. Justices Hughes, Stone, Brandeis, Roberts and Black, all of whom have deserved reputations for devotion to civil liberty, concurred.

This background of torture in connection with the Fifth Amendment is not irrelevant to its use in non-criminal proceedings. The privilege, both historically and rationally, is a safeguard against abuses that would otherwise develop in the detection and prosecution of crime. As we all know, legal principles are construed in relation to their rationale. Employers and legislative committees do not use and do not have available for use the apparatus of torture. Although employees and witnesses before congressional committees may have unpleasant things—such as social ostracism, loss of a job, upsetting one's friends—happen to them as a result of what they say, or of their silence, it has at no time been suggested that the unpleasant thing that was going to happen would be torture. We must therefore realize that the primary justification for the privilege does not apply to non-criminal proceedings and turn to other considerations.

Current controversy over the Fifth Amendment revolves about its relationship with two general principles of the law of evidence.

First of these is what Wigmore calls the "duty to give what evidence one is capable of giving."⁸

Lord Hardwicke put it this way: "The public has a right to every man's evidence."⁹

Chief Justice Marshall, at the trial of Aaron Burr, referred to "the principle which entitles the United States to the testimony of every citizen."¹⁰

This duty is essential to the orderly functioning of society. The right of subpoena, that is the right to require other people to give evidence is fundamental not only to the welfare of the state but to the protection of the citizen. Indeed the defendant's right of compulsory process in criminal trials, that is, the right of subpoena is a provision of the Bill of Rights—in Article Six. Wigmore has said:

"This contribution (that is, the duty to testify) is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled

⁷ *Palko v. Connecticut*, 302 U.S. 319, 325-6 (1937).

⁸ 8 WIGMORE, *op. cit.* §2192.

⁹ XII *Cobbett's Parliamentary History*, 693.

¹⁰ *United States v. Aaron Burr, In Re Willie*, 25 Fed. Cas. 38, 40 (C. C. D. Va. 1807).

to evade or resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him, when it requires to."¹¹

Obviously the Fifth Amendment conflicts with this duty. Fifteen years ago, that is, before the effort to expose Soviet fifth column infiltration of the organizational life of our country had gained public attention, one would have said that whatever difficulties this conflict presented had been resolved. That resolution had been this: When one enjoyed some special benefit or grant from the state, such as employment or a corporate charter or a license, either the Fifth Amendment did not apply at all, or if it did apply, the assertion of the Amendment automatically deprived or could constitutionally be made automatically to deprive, the witness who asserted it of his benefit or grant. Typical of the first situation is the case of *Wilson v. United States*, decided by the Supreme Court in 1911.¹² The Court there held that because a corporation existed by virtue of special license, a charter granted by the state in its discretion, the privilege against self-incrimination did not apply to its papers. A corporate officer could therefore be required to produce and identify corporate papers even if they incriminated him. A recent illustration of the doctrine is *United States v. Field*, decided by the Federal Court of Appeals in New York.¹³ That case concerned a surety on a bail bond. The criminal defendants who were bailed became fugitives from justice after their convictions were affirmed, and the government was attempting to locate them. It questioned Field, the surety on the bond. It was held that the Fifth Amendment did not apply "questions directly pertinent to the whereabouts of the fugitives or to clues to trace down their whereabouts." The Court pointed out that "doctors must report deaths and their causes, druggists must show their prescription lists . . . motor vehicle operators must report details of collisions on highways."¹⁴ And doctors who don't report deaths, druggists who don't show their prescription lists and motor vehicle operators who don't report details of collisions on the highways are not only punished directly for their failure to do so, but in addition are deprived of the licenses by which they are entitled to act as doctors, druggists and motor vehicle operators respectively.

Typical of the second situation—that is, where the holder of the benefit is permitted the use of the privilege against self-incrimination but denied further enjoyment of the benefit is *Christal v. San Fran-*

¹¹ *Supra*, note 8.

¹² 221 U.S. 361.

¹³ 192 F.2d 92 (1951).

¹⁴ *Ibid.* at p. 100.

cisco, decided in 1939.¹⁵ There several policemen invoked the privilege against self-incrimination and the Commissioner of Police dismissed them from the force. They appealed to the courts, who sustained the Commissioner, saying:

"Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege but the exercise of such privilege was wholly inconsistent with their duty as police officers."

An Illinois decision, more recent, upheld the discharge of a policeman who invoked the privilege against self-incrimination. The Illinois court held that use of the privilege was "conduct unbecoming an officer" of the police department of the City of Chicago.¹⁶

These and similar cases held that public employment could be terminated upon an invocation of the privilege.

In New York the courts at one time refused to sustain discharges from public employment by reason of invocation of the privilege. In consequence, during the Seabury investigation of municipal corruption in New York City some twenty-five years ago the public was treated to the spectacle of numerous officeholders refusing to answer questions on the ground of self-incrimination. Subsequently both the Charter of the City of New York and the Constitution of the State of New York were amended to provide that officeholders who invoked the privilege should automatically lose their jobs. The validity of these provisions was sustained by our New York courts.¹⁷

Similarly it is held that a bankrupt who invokes the Fifth Amendment will be denied a discharge from his debts. Discharge is, of course, a special benefit granted by the Government, but subject to conditions. One of those conditions is that the bankrupt answer all proper questions by his creditors. If he fails to do so, whether he rests his refusal on the Fifth Amendment or any other ground, he is denied his discharge.¹⁸

As to lawyers, the Supreme Court of Florida recently held that invocation of the Fifth Amendment was not ground for disbarment.¹⁹ Dean Griswold approves the Florida decision. I confess that I must disagree. If doctors, druggists, motor vehicle operators, corporation officers must answer questions or lose their licenses, I see no reason why lawyers should not be held to an equal standard. If invocation of

¹⁵ 33 Cal.App. 564, 92 P.2d 416.

¹⁶ 339 Ill.App. 33, 88 N.E.2d 728 (1949).

¹⁷ CHARTER §903. *In Re Goldway*, 178 Misc. 1023, 37 N.Y.S.2d 34 (1942); *In Re Shlakman*, 306 N.Y. 532, 119 N.E.2d 373 (1953); *In Re Delehanty*, 304 N.Y. 727, 108 N.E.2d 46 (1952); N.Y. CONST. Art. I, Sec. 6. *Carteline v. McClellan*, 282 N.Y. 766, 25 N.E.2d 972 (1940).

¹⁸ *In Re Dresser*, 146 Fed. 483 (2nd Cir. 1906); *In Re Weinrab*, 153 Fed. 363 (2nd Cir. 1907); *Kaufman v. Hurwitz*, 176 F.2d 210 (4th Cir. 1949).

¹⁹ 82 So.2d 657 (1955).

the privilege is conduct unbecoming a police officer of the City of Chicago, in my opinion it is conduct unbecoming a lawyer. I think lawyers are—or should be—as high in the scale of social conduct as Chicago policemen.

I noted some time back that current controversy over the Fifth Amendment revolved about its relationship with two general principles of the law of evidence, and that the first was "the duty to give what evidence one was capable of giving." The other principle is that silence gives rise to an adverse inference. Of course the precise inference depends upon the circumstances. As the circumstances vary infinitely, the short way of putting the deduction to be drawn when a witness is silent is to say that it is adverse, against the witness.²⁰ Nowadays it is suggested that somehow or other it is unconstitutional or disloyal to the Founding Fathers to conclude that when a witness refuses to testify on Fifth Amendment grounds he is guilty of the act concerning which he is silent. Let us examine that proposition.

The adverse inference ordinarily drawn from silence—I am getting away for the moment from Fifth Amendment silence—is one of the most powerful inferences, if not the most powerful inference, in human affairs. Undoubtedly we have all experienced such silence in both directions. That is, I am sure, each of us has—I know I have—had occasion to be silent on some subject because if he spoke what he said would injure him in some way. And I am also sure that we have noticed the silence of others and have construed it to mean that whatever that other person had to say on the subject in question would, if he said it, be used against him.

The decisions of the courts reflect and enforce this inference. Lord Mansfield said:

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."²¹

There are countless illustrations of the application of this principle in judicial decisions. In my article on the Fifth Amendment I cited numerous illustrations;²² I could readily have cited many more.

Now there are those who would have us believe that although silence in the usual situation gives rise to an adverse inference, there is something about constitutionally-protected silence which requires a different result. That is, if a witness simply refuses to answer a question, is mute, we can draw an adverse inference, but if he says,

²⁰ "Silence under accusation shows guilt, unless under the circumstances a reply was not to be expected." Hutchins, *Some Observations on the Law of Evidence—Consciousness of Guilt*, 77 U. OF PA. L. REV. 725, 728 (1929).

²¹ *Blotch v. Archer*, Cowp. 55 (K.B. 1745).

²² *Op. cit.*, *supra*, note 5 at pp. 38-42.

"The reason I am silent is because an answer would incriminate me," then we cannot draw that adverse inference. I do not agree.

It is true that the laws of many of the states forbid, in criminal proceedings, an adverse inference if the defendant does not testify, but the rule is by no means universal even in criminal cases.²³ In Ohio, for instance, where Dean Griswold was brought up and went to college, the Constitution expressly provides that the jury may draw such inference as it sees fit from the failure of the defendant in a criminal case to testify on his own behalf, and that in summation the prosecution may comment on this silence of the defendant. I don't think there is any lack of constitutional liberty in Ohio and I imagine that Dean Griswold, who has had better opportunities for observation, agrees with me. Similar constitutional or statutory provisions exist in a number of other states including California, New Jersey and Vermont. In other states, such as Connecticut, and in Great Britain, more or less the same result has been reached by judicial decision.

I have alluded to the fact that in many states the rule against the adverse inference from the silence of a defendant in a criminal case existed by reason of statutes. These statutes were adopted in the middle of the nineteenth century when the states made defendants in criminal cases competent witnesses in their own behalf. Previously they had been like the parties litigant in civil cases, neither compellable nor eligible to testify. In that era the leading treatise on the Law of Evidence was Greenleaf on Evidence. It ranked with Wigmore on Evidence today. Professor Greenleaf was Professor of Evidence at the Harvard Law School. The comment in Greenleaf on Evidence on these laws against adverse inference was as follows:

"It may be doubted whether a statute which prohibits any such inference is not nugatory as contrary to the human mind. A statute that upon proof that the sun was shining, no inference that it was light should be drawn by the jury, if not against the constitution of a State, is against the nature of things."²⁴

Let us now turn to non-criminal proceedings. It is a general rule, with, I believe, only negligible exceptions, that an adverse inference follows from an invocation of the Fifth Amendment. The question may arise in any of a number of ways. In a contract case, such as *Andrews v. Frye*, a decision of the Supreme Judicial Court of Massachusetts, there may be a question of the legality of the contract.

This was an action to collect the purchase price on the sale of a quantity of intoxicating liquor. The sale had been made in the State of Maine at a time when the laws of that state forbade the sale of

²³ The statutes are collected at 8 WIGMORE, *op. cit.* §2272, footnote 2.

²⁴ 1 GREENLEAF, EVIDENCE (14th Ed. 1883) §451, footnote (c).

liquor except under license. The defense was that the agreement was void because illegal.

At the trial, to quote from the opinion,

"One of the plaintiffs, having offered himself as a witness in their behalf, was asked by the defendants on cross-examination whether the plaintiffs had a license to sell intoxicating liquors, and declined to answer upon the ground that it might have a tendency to criminate himself . . .

"This refusal to answer, like any other refusal to produce evidence in his own power, was competent evidence against him and his partner . . .

"The ruling of the superior court, that the defendants had not offered sufficient evidence to prove that the sale was in violation of the laws of the state of Maine, was therefore erroneous, because it withdrew from the jury a matter which was proper for their consideration, and upon which they would have been warranted by law in finding that the defendants had sustained the burden resting upon them of proving that the sale was illegal."²⁵

Or as in *United States v. Mammoth Oil Company*, the government may demand a forfeiture on the claim that a grant had been induced by bribery. There the Court of Appeals of the Eighth Circuit said, in part:

"Why is silence the answer of a former cabinet officer to the charge of corruption? Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his government? Why is the plea of self-incrimination—one not resorted to by honest men—the refuge of Fall's son-in-law, Everhart?"

And the Court upheld the Government's demand for forfeiture.²⁶

Or the question may be what opinion the public may draw. In *Commonwealth v. Smith*, a decision of the Supreme Judicial Court of Massachusetts, in which it appeared that at one time the defendant had invoked the privilege, the Court said:

"The Constitution and laws do not and could not assume to say that no unfavorable private opinion should be formed."²⁷

On occasion a proceeding to remove a public official may involve charges of criminal misconduct. *Commonwealth v. Pelletier*, also a

²⁵ 104 Mass. 234, 237 (1870). The cases on the inferences to be drawn from invocation of the privilege are collected in West Reporting Company Digests under "Witnesses" key number 309.

²⁶ 14 F.2d 705, 729 (8th Cir. 1926). In this case the District Court engaged in a number of speculations satisfactory to it why the witnesses might have been silent consistently with innocence. 5 F.2d 330, 348 (D. Wyo. 1925). The Court of Appeals reversed the District Court.

²⁷ 163 Mass. 411, 430 (1896). Mr. Justice Holmes, later of the United States Supreme Court and highly regarded for his devotion to civil liberty, was at that time a member of the Massachusetts court and concurred in this language.

Massachusetts decision, was such a case. The official failed to testify. The Court removed him and said, in part:

"Instant impulse, spontaneous anxiety and deep yearning to repel charges thus impugning his honor would be expected from an innocent man. Refusal to testify himself or to call available witnesses in his own behalf under such circumstances warrants inferences unfavorable to the respondent. It is conduct in the nature of an admission. It is evidence against him. This principle of law has long been established and constantly applied. The reason is that it is an attribute of human nature to resent such imputations. In the face of such accusations, men commonly do not remain mute but voice their denial with earnestness, if they can do so with honesty. Culpability alone seals their lips."²⁸

A somewhat related point arises in criminal prosecutions in which the defendant, after invoking the privilege in the early stages of the case, eventually waives it and takes the stand on his own behalf. It is held that his taking advantage of the privilege may be used against him in cross-examination, and made the subject of adverse comment in the prosecution's summation. *Raffel v. United States*, a decision of the United States Supreme Court,²⁹ is the leading case on this point.

Now in considering the adverse inference drawn from silence a distinction is to be made from silence in the proceeding itself and silence on an earlier occasion when there was an opportunity to speak. Let me illustrate. Let us assume a non-criminal proceeding. An accusation is made and not answered. The trier of facts, whether a jury, a judge sitting without a jury, or an administrative board or committee, is not only permitted but required to draw an adverse inference in making the decision in that proceeding.

Or it may develop in the course of a proceeding that on some earlier occasion the party was accused and did not answer, as in the *Raffel* type of case. Then the party should have an opportunity to explain his former silence. For instance, in *Commonwealth v. Smith*, the Massachusetts case to which I have already referred,³⁰ it developed that in an investigation of alleged bribery, the defendant, an alderman, had invoked the privilege against self-incrimination before the Grand Jury. Later he was indicted for accepting bribes. He testified in his own defense, and the prosecution, over the objection of his counsel, brought out on cross-examination that he had pleaded the privilege before the Grand Jury. The alderman was convicted, but took an

²⁸ 240 Mass. 264, 316, 134 N.E. 407, 423 (1922).

²⁹ 271 U.S. 494 (1926). To the same effect are: *McKee v. People*, 72 Colo. 55, 209 Pac. 632 (1922); *People v. Marcus*, 235 App.Div. 397 (N.Y. 1932); *Commonwealth v. Smith*, *supra*, note 27; *Tomlinson v. United States*, 93 F.2d 652 (D.C. Cir. 1937).

³⁰ *Supra*, note 27.

appeal alleging that the trial court had committed error in permitting this cross-examination. The Supreme Judicial Court said:

"The defendant . . . now says he is innocent but that he would not answer lest he might criminate himself. This fact though open to explanation has some tendency to throw a doubt upon the truth of his present testimony."³¹

Similarly, to apply that rule to the present situation, I think that when a teacher is silent in a proceeding directly related to his tenure of office, the board or committee in charge of the matter should draw an adverse inference from that silence. On the other hand, if a teacher employed by a private institution, invokes the privilege before some other body, such as a congressional committee, he should have an opportunity to explain. But his explanation, from my point of view, would have to be a good one. There are two such explanations commonly made, according to the newspapers, which to my mind are most unpersuasive. If I were the employer, or on the board or committee of an employing institution, I would not accept either of these explanations.

The first such explanation commonly given is that the teacher did not want to cause his friends trouble or inconvenience, and he knew that if he admitted membership in the Communist party he would be asked about his fellow members. The oath of the witness is: "I swear to tell the truth, the whole truth, and nothing but the truth." The oath is *not*, "I swear to tell the truth, the whole truth and nothing but the truth *except* in so far as in my opinion the truth will be inconvenient or distressing to my friends." If those who believe that a witness should not be required to inconvenience their friends would come forward with a proposal to revise the oath of the witness, the subject could be publicly debated and if the proponents of such a revision could persuade Congress and our legislatures, the refusal to give testimony inconveniencing friends would be made legitimate. I suspect the reason that no such proposal has been made is that there is every reason to believe that if it were made, it would be overwhelmingly rejected by public opinion. If the duty of a witness were thus limited, the right of subpoena would become virtually worthless and trials would become mere contests between one party and his friends on one side, and the other party and his friends on the other. The so-called "hostile witness," who is so often the most valuable witness in the ascertainment of truth, would become unknown.

Now, as Chief Justice Marshall pointed out at the trial of Aaron Burr, a witness commits perjury when he invokes the Fifth Amendment unless he genuinely believes that his answer would tend to show

³¹ *Supra*, note 27 at p. 432.

him guilty of a crime.³² A witness consciously invoking the Fifth Amendment, not for his own protection, but for that of his friends is therefore a perjurer, and I see no reason why he should not be dealt with as such.

Lest this sound too ruthless let me say that, in my opinion, it is unduly severe for a Congressional committee to call upon a former Communist publicly to identify, against his will, his associates in the party *unless* this former Communist has refused to give the information to the FBI. I am told by officials whom I believe, that as a practical matter, Congressional committees do not do so; that is, the only former Communists called upon publicly against their will, to name their party associates are people who have previously refused to give this information to the FBI.

Let me also say that a witness, who out of sincere principle refused to testify before a Congressional committee, without invoking the Fifth Amendment and took the consequences, would command my respect although I would disagree with him. But I have no sympathy for the witness who perjurally misuses the Fifth Amendment in order to avoid a duty required of witnesses for four hundred years, viz., the duty to tell "the whole truth."

A second explanation of use of the Fifth Amendment, frequently made according to the press, is that the witness was frightened by Kleig lights and the presence of newspaper men, and invoked the Amendment in a desperate effort to protect himself, although he was guilty of no crime. Sympathizers with this explanation argue, among other things, that Congressmen browbeat witnesses, while in ordinary court trials a judge is there to protect the witness from being bullied. As a lawyer who has done a good deal of court work, I do not find this explanation convincing, particularly when it is given by a person of superior intelligence such as a lawyer or a teacher. In my younger days, I was an Assistant District Attorney and often prosecuted in criminal cases, and more recently I have been on the defense side in personal injury cases. In this type of case the witnesses are markedly less accustomed to the use of words, to occupying the spotlight, to duels of wit, than the lawyers. The witnesses are, according to the standards of measurement developed by our scientists, less intelligent than the lawyers. In cross-examining the plaintiff in a personal injury case, the defense lawyer uses every trick at his command to discredit the witness. The plaintiff has his own lawyer there, to be sure, and a judge is there, too, but they rarely intervene; at least in the New York courts. The reason why the plaintiff's lawyer does not intervene is because intervention would be interpreted by the jury as a sign of

³² 25 Fed. Cas. 40.

weakness. In New York it is understood that to win his case, the plaintiff has got to be able to take care of himself against everything that opposing counsel can say or ask. Do these workmen and clerks crumble up under relentless questioning by resourceful lawyers? Sometimes they do, but just as often, if not more often, it is the lawyer who comes out second best. I regret to say that I have had this sad experience, despite the fact that I started out my cross-examination with what seemed to be pretty formidable ammunition. And when such witnesses do crumble up, it is because it has been shown that they are lying. How can this ability of the witnesses to stand up to lawyers be explained? The only explanation that I have ever heard, and the only one persuasive to me, is that the witness who is telling the truth has nothing to fear from the most brilliant examiner in the world.

Now when I was in Washington and my business took me to the Capitol I dropped in occasionally on these Congressional investigations. I never observed any discourtesy to a witness. I never heard an examination that, for force and vigor, remotely resembled the cross-examinations that are routine in the New York courts. As far as discourtesy is concerned, on several occasions I heard witnesses be rude to the committees. Moreover Congressional hearings are ordinarily attended by the press, a substantial section of which has been most unfriendly to the investigations of treason and espionage. Discourtesy to a witness would be immediately featured by the unfriendly section of the press, as Congressmen are well aware.

Here I want to mention the junior Senator from Wisconsin. I do so with reluctance because I find his name is more productive of emotion than of that calm detachment which is necessary to successful scholarship, and Dean Seitz has emphasized that this evening is to be devoted to scholarship. I mention him only because, to do so, is necessary to my point. Everyone will agree, I assume, that no investigating Congressman has been more severely criticized than Senator McCarthy. You will all recall that in the summer of 1954 resolutions to censure him were introduced in the Senate. No one can read the resolutions of censure without being impressed by the thorough and exhaustive analysis of Senator McCarthy's record that had been made by his political adversaries—as, of course, they had every right to do.³³ Now Senator McCarthy had up to that time examined over 1400 witnesses as chairman of the Government Operations Committee. Of the forty-odd counts in the censure resolutions only one charged discourtesy to a witness—the so-called Zwicker count. And even the Zwicker count, although sustained by the Watkins Committee³⁴ was

³³ *Hearings before a Select Committee to study Censure Charges*, U.S. Senate, 83rd Cong., 2d Sess., pursuant to the order on S. Res. 301, pp. 2-8.

³⁴ SEN.REP. No. 2508, 83d Cong., 2d Sess. 61.

eventually rejected by the full Senate, although Senator McCarthy was censured on other grounds.³⁵ Now if this most controversial investigator, who examined 1400 witnesses, could be accused of discourtesy to only a single witness by painstaking and bitter political opponents, and if that single accusation was not upheld by a majority vote of a hostile Senate, I would be extremely skeptical, especially in the light of my own observations, about the excuse made by a lawyer or professor that he invoked the Fifth Amendment because of intimidation by a Congressional committee.

I regard the ordinary lawyer or professor as of, if not equal, intelligence, at least comparable intelligence with that of a Congressman. If workmen and clerks who tell the truth can hold their own with resourceful and experienced lawyers in courtroom cross-examinations with few holds barred, I think a lawyer or professor should be able to hold his own with a Congressman in a Congressional investigation.

³⁵ 100 CONG. REC. 16370, 16380-16381, 83d Cong. 2d Sess. The Zwicker count was Section 2 of the resolution of censure as reported by the Watkins Committee. The rejection of the Zwicker count took the form of the substitution of a new and different Section 2 by which Senator McCarthy was censured for remarks criticizing the Watkins Committee. The motion to substitute was offered by Senator Bennett at p. 16370 and adopted by the Senate at pp. 16380-16381.